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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 854

JAMES F. TORRANCE, Petitioner

v.

JOSEPH SALZINGER, Warden of the Dauphin County Prison, and WESLEY M. BARRICK, Sheriff of Dauphin County, Pennsylvania, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Third Circuit entered in the above entitled case on January 10, 1962.

OPINIONS OF THE COURT BELOW

The opinion of the District Court is reported at 195 F. Supp. 804 (Opinions Below—Separately Presented p. 9a). The opinion of the Court of Appeals for the Third Circuit is not yet reported.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on January 10, 1962 (Appendix A, infra). The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTION PRESENTED

In a state conspiracy trial, was it not fundamentally unfair to a defendant against whom the evidence was at best very slight, for the court to permit the prosecutor to read into evidence (as an admission and with the customary 'limiting' instruction) all of the lengthy interrogation before a Grand Jury of one of petitioner's eight co-defendants without deleting therefrom the innuendos and factual misstatements made by the prosecuting attorney during the course of the interrogation and other inadmissible matter accusatory of petitioner and the remaining defendants?

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV to the Constitution of the United States:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

These proceedings involve petitioner's effort, through Federal Habeas Corpus, to obtain his release from confinement under a sentence imposed upon his Pennsylvania convictions. Petitioner contended below that he had been denied due process in his state trial in a number of respects, but in this petition, he tenders the single ground that the state's use of testimony admissible—if at all—only against a co-defendant was, in the special circumstances of this case, so fundamentally unfair to petitioner, as to amount to a denial of due process of law..

Before his confinement in the Dauphin County Prison near Harrisburg, Pennsylvania, petitioner had resided for almost seventy-five years in Westmoreland County, Pennsylvania. (5105r)* Principally, he was a farmer, working a farm which had been in his family since it was given as an original land grant to an ancestor who had fought with the Revolutionary Army. In addition, however, for many years, petitioner occupied positions of respect and importance in various branches of local and state government. He was a leader in his political party and for about fifteen years, he was a member of the Pennsylvania Turnpike Commission and served in some of those years as its Secretary-Treasurer. (5105r-5108r)*

Just before the presidential election of 1956, the then Governor of Pennsylvania announced at a special

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* Reference (—r) is to the trial transcript made part of the record below by stipulation.

press conference that his administration had uncovered "one of the greatest swindles of all times in the Turnpike Commission under Republican control." (110a)**. He charged that the "Republican leaders" of the Turnpike Commission had conspired with the officers of a company known as the Manu-Mine Research and Development Corporation to steal $20,000,000 from the Commission's treasury by entering into contracts without competitive bidding, to do unnecessary drilling and other work in connection with the construction of an extension of the Pennsylvania Turnpike through the anthracite coal regions of Pennsylvania. (110a)

These spectacular charges were widely publicized and were made the subject of a special investigating grand jury. In January 1957, petitioner and eight other persons were indicted on charges of having conspired to cheat and defraud the Pennsylvania Turnpike Commission in connection with the Manu-Mine scandal. (8r) Petitioner was also charged in a separate indictment with three counts of misbehavior in office, based upon the same charges. (417r)

In July 1957, after a trial which lasted for more than seven weeks, and in which all of the charges against the various defendants were consolidated (nine defendants, four indictments, totalling twenty-seven counts), petitioner was convicted on both indictments. (3r, 414r)

Just before the Commonwealth closed its case in chief, the prosecutor was allowed to read into evi-

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** Reference (—a) is to Appendix in Court of Appeals.

dence 250 pages of testimony representing the interrogation of one of the nine defendants before the investigating grand jury. (41a-104a) Although received as an admission against only that defendant, the interrogation consisted in large part of testimony by the prosecuting attorney, who through leading questions and innuendo, put before the jury, the Commonwealth's theory of the case. The matters which were thus read to the petit jury in Torrance's trial were a melange of conjecture, innuendo, hearsay, opinion and flat misstatement of fact. (41a-104a) The trial judge was asked by petitioner to restrict the prosecutor to reading only those portions of the testimony which might be admissible against the defendant Paul against whom it was purportedly offered, but the trial judge refused this request. (54a-57a) Instead he announced that he would rely upon the prosecuting attorneys to offer only so much of the testimony as was relevant. (55a) After this ruling, the prosecutor was allowed to read the complete transcript of Paul's grand jury interrogation, without deleting any of the objectionable material. The trial judge gave the customary instructions admonishing the jury to consider the excerpts only against petitioner's co-defendant Paul.

In the Commonwealth's brief in the Pennsylvania Supreme Court, beginning at page 2, is a summary of the portions of Paul's testimony considered by it to be significant. This summary covers less than two printed pages and refers to only 34 of the more than 250 pages read into the record. All of the matters referred to in that summary (many of which are themselves immaterial or irrelevant) could have been read into evi-

dence by the reading of only a few excerpts from Paul's grand jury testimony.

Petitioner appealed his convictions to the Pennsylvania Superior Court, which affirmed (except as to one count in the misbehavior in office indictment) by 4 to 3 decision (Opinions Below — Separately Presented p. 128a). The Pennsylvania Supreme Court granted allocatur, but affirmed the convictions, 4 to 2 (Opinions Below—Separately Presented p. 177a). Application was then made to this Court for Writ of Certiorari to the Pennsylvania Supreme Court but certiorari was denied. (364 U.S. 899)

In January 1960, Torrance was confined to the Dauphin County Prison pursuant to the sentences imposed upon the judgments of conviction. He then filed a petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Pennsylvania. It was agreed to submit the matters raised therein by the petition and answer, upon the record created at the trial of the criminal charges in the state court. By order of Judge Austin Staley, Circuit Judge sitting as a District Judge, petitioner was enlarged on bail during the pendency of his application for a Writ of Habeas Corpus before the District Court, because of his advanced years and state of health. On June 30, 1961, the District Court discharged the rule to show cause why a writ of habeas corpus should not be granted and shortly thereafter, revoked petitioner's bail. He has been confined continuously since July 19, 1961.

Petitioner filed an appeal to the Court of Appeals for the Third Circuit from the refusal of the District Court to issue a writ of habeas corpus, and on January 10, 1962, the Court of Appeals affirmed the refusal. (Appendix A, infra)

Certiorari is sought to bring before this Court the question of the propriety of the ruling of the Court of Appeals, to the extent that it gives approbation to the use at petitioner's trial of the Grand Jury interrogation of petitioner's co-defendant.

Petitioner also contended below that the evidence at his state trial was so lacking in probative value that his confinement was a violation of due process for this reason alone. The Court of Appeals held that petitioner had not exhausted his state remedies with respect to this issue and suggested that he apply to the Pennsylvania courts for a writ of habeas corpus, in order to exhaust his state remedies before tendering the issue to the United States courts. The Pennsylvania Supreme Court accepted original jurisdiction of an application for writ of habeas corpus, but denied the writ. (Opinions Below — Separately Presented p. 41a). Petitioner will seek to bring this ruling before this Court, by a companion application for a writ of certiorari directed to the Pennsylvania Supreme Court, to be filed with the within petition.

REASONS FOR GRANTING WRIT

Because the ruling complained of permitted the State to use testimony known to the prosecutor to be false,[1] the decision of the Court of Appeals that the ruling presented no constitutional infirmity is in conflict in principle with *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173; 3 L. Ed. 2d 1217 (1959). However, the overriding reason for granting the writ is that this case presents an important question of federal law which has not been, but should be, settled by this Court, namely, the extent to which the Fourteenth Amendment may impose restrictions on a State's use of testimony of limited admissibility in a conspiracy trial.

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1. Illustrative of the factual misstatement which the prosecution introduced into the minds of the trial jury through reading the interrogation of the witness Paul before the Grand Jury is the suggestion made therein by the prosecutor that the witness Paul had been given a promotion in September 1953, coincidentally with the beginning of Manu-Mine's interest in a contract to do work on the Turnpike extension in order that the Chairman of the Commission could by-pass the Chief Engineer of the Turnpike Commission and handle matters relating to the contract through Paul, whom he could dupe. (42a-48a) This entire pyramid is premised on the assertion of the prosecutor that Paul's promotion had occurred in September 1953. The fact is that it had occurred a year earlier in September 1952, long before there was any interest in such a contract. (107a-109a) The records of the Turnpike Commission were in the possession of the prosecutor throughout the trial and must have disclosed this to the Commonwealth; yet this testimony and the erroneous statement on which it was premised were read without correction or qualification to the petit jury. (42a-48a)

Reasons for Granting the Writ.

This Court has more than once expressed misgivings about the unique opportunities for unfairness to defendants in conspiracy trials. In *Krulewitch v. United States,* 336 U.S. 440, 446, 69 S. Ct. 716, 93 L. Ed. 790 (1949), Mr. Justice Jackson cautioned that loose practice in conspiracy trials constitutes "a serious threat to fairness in our administration of justice." In *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S. Ct. 1239; 90 L. Ed. 1557 (1946), Mr. Justice Rutledge pointed out that the possibilities for a miscarriage of justice are greater in a conspiracy trial than in any other form of criminal trial and that consequently, in such trials, "extra-ordinary precautions" are required in order to safeguard the rights of each defendant. In *Glasser v. United States,* 315 U.S. 60, at 76; 62 S. Ct. 457; 86 L. Ed. 680 (1942), this Court recognized that in conspiracy cases "the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against the individual defendant."

More particularly, this Court has concerned itself with the effect in such trials of the use of evidence admissible against only one defendant, but which contains matter accusatory of the remaining defendants. *Malinski v. New York,* 324 U.S. 401, 411-412, 65 S. Ct. 781, 89 L. Ed. 1029 (1945); *Krulewitch v. United States,* supra; *Lutwak v. United States,* 344 U.S. 604, 619, 73 S. Ct. 481, 97 L. Ed. 593 (1953); *Stein v. New York,* 346 U.S. 156, 194-195, 73 S. Ct. 1077, 97 L. Ed. 1522 (1953) and *Delli Paoli v. United States,* 352 U.S. 232, 77 S. Ct. 294; 1 L. Ed. 2 278 (1957); *Blumenthal v. United States,* 332 U.S. 539, 551, 559, 68 S. Ct. 248; 92 L. Ed. 154 (1947).

Reasons for Granting the Writ.

Up to now, no case has been presented to this Court requiring more than hortatory expressions about the danger of unfair use of testimony in conspiracy cases. In *Malinski v. New York*, supra, and *Stein v. New York*, supra, this Court rejected the contention that a defendant's constitutional rights are violated *per se* by the State's use of a coerced confession against his co-defendant. Unfortunately, lower courts have tended to take the rulings of this Court in *Malinski*, *Stein* and *Delli Paoli* as unqualified approval of the use of admissions of a co-defendant, so long as a limiting instruction concerning the use of such testimony is given to the jury.[2]

The use of the interrogation of petitioner's co-defendant before the Grand Jury as testimony in petitioner's trial is an egregious example of unfair and oppressive use of testimony admissible against only one defendant in a mass conspiracy trial. Not only were the admonitions of this Court concerning the need for special precautions against unfairness overlooked or disregarded; unfortunately and ironically, its ruling in *Delli Paoli* was misunderstood as giving approbation to the offensive practice.

Of the Paul Grand Jury testimony, Mr. Justice Bell (now Chief Justice) of the Pennsylvania Supreme Court, stated that it was "outrageous" and "grossly incompetent" (Opinions Below—Separately Presented pp. 189a, 193a). Judge Watkins of the Pennsylvania Superior Court (dissenting) said:

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2. See, however, Comment: *Post conspiracy admissions in Joint Prosecution—Effectiveness of Instructions, Limiting the Use of Evidence to One Co-Defendant*, 24 Chicago Law Review 710, at 713.

"It was admitted on the theory that it was a confession or admission against the declarant. If the statement served that purpose, our review of the record fails to disclose any paragraph remotely resembling an admission of guilt on his part. It was rather an accusatory declaration, particularly against Mr. Evans, containing hearsay, conjecture and clear misstatement of facts. Had the Commonwealth attempted to offer the same testimony by other witnesses, most of it would have had to be excluded for failing to meet the standards of admissibility." (Opinions Below — Separately Presented p. 172a)

The record amply supports this criticism. (42a-104a)

The very manner in which the prosecutor conducted the interrogation of the witness Paul before the Grand Jury was itself in flagrant disregard of the responsibilities of prosecuting attorneys and falls far short of the standard laid down in *Berger v. United States*, 295 U.S. 78, at 88; 55 S. Ct. 629, 79 L. Ed. 1314 (1935). The transcript of Paul's interrogation is replete with instances of the prosecutor's twisting and misinterpreting what the witness said, misstating facts; assuming the truth of matters not in evidence, and other improper suggestions and insinuations. (41a-104a)

Whatever excuse may be offered for such tactics in the examination of a witness before the Grand Jury, there can be no possible justification for the use of the Grand Jury transcript at petitioner's trial without screening therefrom the objectionable material.

The Court of Appeals felt that the impact of Paul's testimony against petitioner was so slight that no issue of constitutional unfairness emerged from its use. The court finds support for its view from the fact that Paul himself was acquitted. This view overlooks the fact that nowhere in the record—except in the Paul interrogation—is there direct support for the Commonwealth's theory of how the conspiracy was accomplished. Paul's testimony casts petitioner in the role of a willing and cooperative accomplice—while putting himself in the role of an innocent dupe. The jury might have drawn entirely different inferences about petitioner's role if the Paul testimony had been omitted, or even if it had been limited to those portions properly admissible against Paul.

The prospect of an innocent person being committed to prison can be accepted with equanimity only because of the assurance that established criminal procedures ordinarily prevent such miscarriages of justice. However, in conspiracy cases, especially long ones, involving vast amounts of testimony, great numbers of exhibits and multiple defendants, the ordinary processes designed to protect the defendant are not fully effective. Because of the number of parties and issues and the length of the record, post-trial review of error is necessarily less searching as to any one defendant. Because of the length and expense of the trial, the trial court is very unlikely to be persuaded that a new trial ought to be awarded, in the interests of justice, solely because the jury's result had miscarried. The ordinary appellate processes are weakened, if only because the trial transcript is so monstrously long that meaningful appellate review is not feasible in such a case.

As a corollary, it becomes doubly important that *at the trial* of such cases every possible means be taken to prevent error and prejudice to a defendant's rights. Only in this way can procedural due process be assured. The use of the Paul Grand Jury interrogation in petitioner's trial is not consonant with such a standard. Moreover, the risk of prejudice was certainly heightened by the political undertones of the charges against petitioner and the pervasive publicity given the spectacular charges made against him by the governor of the state.

Finally, it may not be inappropriate to suggest to the Court that petitioner's lifetime of dedicated public service makes it a matter of public concern that he should be protected from a miscarriage of justice. For society to offer disgrace and indignity where it owes honor and gratitude is truly tragic. This is the essential irony in the condemnation of Socrates by the Athenians and in the mob's choice of Barabas over Jesus. As observed by John Calvin in Institutes IV, Chapter 20, *On Civil Government*, "The minds of many lose their regard for equity and justice, unless virtue be rewarded with due honor".

For these reasons, it is respectfully requested that this Court issue a Writ of Certiorari in this case.

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,685

JAMES F. TORRANCE, *Appellant*
v.
JOSEPH SALZINGER, WARDEN OF THE DAUPHIN COUNTY PRISON, AND WESLEY M. BARRICK, SHERIFF OF DAUPHIN COUNTY, PENNSYLVANIA.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present:
GOODRICH, MCLAUGHLIN and HASTIE, *Circuit Judges.*

Judgment

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court denying petitioner a writ of habeas corpus be, and the same is hereby affirmed, with costs.

Attest.
IDA O. CRESKOFF
Clerk

January 10, 1962